MOGANA SUNTAHARI SUBRAMANIAM A

v.

KHADIJAH YUSOF & ANOR

HIGH COURT MALAYA, SHAH ALAM B
NORAINI ABDUL RAHMAN JC
[ORIGINATING MOTION NO: MT1-25-41-2008]
28 OCTOBER 2008

LEGAL PROFESSION: *Professional discipline - Suspension from* C
practice - Order of restitution - Appeal against - Whether there was legal or factual justification for suspension and restitution order made by Disciplinary Board - Whether Disciplinary Board entitled to include appellant in the complaint - Legal Profession Act 1976, s. 99(4) - D
Whether Disciplinary Board could exercise powers under s. 103D Legal Profession Act 1976 - Whether order of Disciplinary Board made correctly and within powers conferred by Legal Profession (Amendment) Act 2006 - Rules of the High Court 1980, O. 55, O. 92

This was an appeal by the appellant for an order that the E
punishment against the appellant imposed by the Disciplinary Board (DB) be replaced with the Disciplinary Committee's Recommendation (DC) and that the order of restitution be revoked. The appeal was by way of originating motion under O. 55 and O. 92 of the Rules of the High Court 1980. Briefly, F
the first respondent had engaged Messrs Junaidah, Mogana and Partners to prepare a sale and purchase agreement relating to a property belonging to her late father and of which she was the administrator. The second respondent was the solicitor in charge of the matter. The first respondent was given three cheques each G
time for RM187,200 being the balance of the purchase price due to her under the sale and purchase agreement and each time the cheque was stopped payment by the appellant's and second respondent's firm *ie* Messrs Junaidah, Mogana and Partners. The first respondent wrote to the DB about the matter. The DB H
appointed the DC to conduct investigation on the complaint. After having conducted investigation proceeding, the DC submitted the Disciplinary Committee Report to the DB with, *inter alia*, the following recommendation, that the appellant be suspended from practice as an advocate and solicitor for a period of one year I
under s. 103C(c) (ii) of the Legal Profession Act 1976. Subsequently, the DB made an order suspending the appellant from practice as an advocate and solicitor of the High Court of

Malaya for a period of three years and further ordered that the respondent refund the sum of RM187,200 to the complainant pursuant to s. 103D(5) of the Act. The main contention of the appellant was that (a) there was no factual or legal justification for the suspension order made by the DB; (b) there was no legal justification for the restitution order. The appellant submitted that the letter of formal complaint was the letter from the first respondent to DB dated 30 August 2006 (first complaint) directed against the legal firm of Messrs Junaidah, Mogana and Partners and the letter of complaint from first respondent to DB dated 2 February 2007 (second complaint) except for the second paragraph was exactly the same as that contained in the first complaint. The appellant argued of the conflicting position taken by the DB *vide* letter to first respondent dated 7 December 2006 where it stated that the DB 'cannot now add Ms Mogana Sundhari a/p Subramaniam into your said complaint ...'. In contrast, the DB later, on 1 March 2007, sent a letter to the appellant containing the following words 'As the crux of the complaint involved your firms cheque the Board is of the view that you are also to be named as respondent in the complaint ...' The first respondent submitted that it was the letter dated 2 February 2008 that formed the formal complaint (second complaint) and had complied with r. 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. According to the first respondent, because the second complaint was made after the coming into force of the Legal Profession (Amendment) Act 2006 on 2 October 2006, the DB was empowered to exercise the powers conferred on it under the law.

Held (dismissing appellant's appeal):

(1) To make a complaint, a person must comply with r. 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. The Director of the Complaints Secretariat shall not register complaints that had not complied with the rules. It was for this reason that the 'first complaint' was not registered against the appellant. (para 9)

(2) On the point that there seem to be a conflict in DB's decision informing the first respondent that it could not proceed against the appellant and subsequently informing the appellant of its view to include the appellant as a respondent in the complaint,

the DB was entitled to do so *ie*, to include the appellant as a respondent in the complaint (s. 99(4) of the Legal Profession Act 1976). (para 10)

(3) The complaint against the appellant was made in the letter dated 2 February 2007. Following the said finding, the DB, after considering the Disciplinary Committee Report, could exercise the powers under s. 103D of the Legal Profession Act 1976 and imposed a greater punishment than that recommended by the DC. The DB's order dated 25 April 2008 was made correctly and within the powers of the DB conferred by Legal Profession (Amendment) Act 2006 (Act A1269). (para 11)

Legislation referred to:
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 3(2)
Legal Profession Act 1976, ss. 99(4)(b), 103C(1)(c)(ii), 103D
Rules of the High Court 1980, O. 55, O. 92

For the appellant - Mogana Sunthari (N Chandran, Ranjan Chandran & T Naraedran with him); M/s A Sivanesan & Co
For the 1st respondent - Khadijah Yusof (En Azhar with him); M/s Hasnan Hamzah
For the 2nd respondent - Junaidah Md Noh (En Ahmad with him); M/s Syed Hussein & Rakan-Rakan

Reported by Suhainah Wahiduddin

JUDGMENT

Noraini Abdul Rahman JC:

[1] This is an appeal by the appellant for an order that the punishment against the appellant imposed by the disciplinary board (DB) dated 25 April 2008 be replaced with the disciplinary committee's recommendation (DC) *vide* the report of the DC dated 31 October 2007 and that the order of restitution be revoked.

The appeal was by way of originating motion under O. 55 and 92 of the Rules of the High Court 1980 filed on 25 August 2008 (encl. 1).

The brief facts of the case are as follows:

[2] The 1st respondent engaged Messrs Junaidah, Mogana and Partners to prepare a sale and purchase agreement relating to a property belonging to her late father and of which she is the administrator. The 2nd respondent was the solicitor in charge of the matter. The 1st respondent was given three cheques each time for RM187,200 being the balance of the purchase price due to her under the sale and purchase agreement and each time the cheque was stopped payment by the appellant's and 2nd respondent's firm ie, Messrs Junaidah, Mogana and Partners.

[3] The 1st respondent wrote to the DB about the matter. The DB appointed the DC to conduct investigation on the complaint. After having conducted investigation proceeding, the DC submitted the Disciplinary Committee Report (DC/06/2640 and DC/07/2837) to the DB on 12 November 2007 with the following recommendations:

(i) that respondent 1 (2nd respondent in this appeal) be suspended from practice as an advocate and solicitor for a period of two years; and

(ii) that respondent 2 (appellant in this appeal) be suspended from practice as an advocate and solicitor for a period of one year; under s. 103C(1)(c)(ii) of the Legal Profession Act 1976.

Subsequently, the DB made an order as against the appellant as follows.

In The Matter Of A Complaint Before The
Advocates And Solicitors Disciplinary Board
Complaint No: DC/07/2837 C/R DC/06/2640

Between

Khadijah Binti Yusof — Complainant

And

Mogana Sunthari a/p Subramaniam — Respondent

Legal Profession Act 1976 (As Amended)
Order Under Section 103D

In exercise of the powers conferred by Section 103D of the Legal Profession Act 1976 (the Act), the Disciplinary Board on 25 April 2008 considered the Report made by the Disciplinary Committee on the complaint against the Respondent and upon the hearing the

Respondent and Mr. Naraendran a/l A Thiagarajah Counsel for the Respondent, has Ordered that the Respondent be suspended from practice as an Advocate and Solicitor of the High Court of Malaya for a period of Three (3) years. It was Further Ordered that the suspension is to take effect twenty one (21) days from the date of this Order and is to expire on 16 May 2011.

The Disciplinary Board has Further Ordered that the Respondent do refund the sum of RM187,200.00 to the Complainant pursuant to s. 103D(5) of the Act within six (6) months from the date of this Order.

Dated 25 April 2008

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Tan Sri Dato' Seri Khalid Ahmad Bin Sulaiman
Chairman
Advocates & Solicitors Disciplinary Board

At the hearing of this appeal, references were made to the following relevant documents tendered as exhibits in encls. 6 and 7. For purposes of easy reference the exhibits are listed below in chronological order:

Letter dated 1 August 2006 by 1st respondent to the firm of Messrs Junaidah, Mogana and Partners.

Letter dated 11 August 2006 by 1st respondent, to the DB complaining about the firms conduct. That letter did not name any advocate and solicitor.

Letter dated 30 August 2006 (hereinafter referred to as first complaint) by 1st respondent to DB named 2nd respondent as the advocate and solicitor handling the 1st respondents' transaction.

Letter dated 5 September 2006 by the DB to 1st respondent requesting the 1st respondent to comply with certain requirements. (These requirements are in compliance with r. 3, Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (PU(A) 189/1994).

Letter dated 9 October 2006 by DB to 2nd respondent asking for explanation to the complaint.

A Letter dated 1 November 2006 by 1st respondent to DB where 1st respondent requested DB to take action against all parties and staff of Messrs Junaidah, Mogana and Partners. She named the appellant as one of those persons.

B Letter dated 20 November 2006 by 2nd respondent is her explanation to DB in reply to the DB's earlier letter dated 9 October 2006.

Letter dated 7 December 2006 by DB to 1st respondent where part of the letter stated:
C

> Please be informed that as your letter of complaint and the Statutory Declaration in support of your complaint dated 30/8/06 was only in respect of Junaidah Bt Md Noh, we cannot now add Ms Mogana Sundhari a/p Subramaniam, partner of the firm into your said complaint. You may, however lodge a separate
D complaint against her in which we will assign a separate complaint number after you have complied with our guidelines to lodge a complaint.

Letter dated 2 February 2007 by 1st respondent to the DB
E where she officially complained against the appellant.

(This letter of complaint complied with r. 3 of PU(A)189/1994).

Letter dated 23 February 2007 by DB to the appellant requesting her to give her explanation with regard to complaint no. DB/06/
F 2640.

Letter dated 1 March 2007 by DB to appellant where DB stated "As the crux of the complaint involved your firm's cheque which payment was stopped, the board was of the view that you are
G also to be named as the respondent in the complaint and to submit your explanation in this matter."

Letter dated 7 March 2007 by appellant to DB giving her explanation to complain no: DB/06/2640.

H Letter 6 April 2007 by appellant to DB where she enclosed explanation to 2nd respondent's complaint dated 30 August 2006 and 1 November 2006.

Letter dated 25 April 2007 by DB to appellant asking for a
I written explanation of the letter of complaint dated 2 February 2007 against her. This letter also stated "As we note that this complaint is cross referenced with complaint no. DB/06/2640,

please confirm if you wish to treat or adopt your explanation to complaint no. DB/06/2640 as your explanation to the above complaint." A

Letter dated 10 May 2007 by appellant to DB (complaint no: DB/07/2837) informing the DB that she wished to adopt her explanation for complaint no: DB/06/2640. B

The main contention of the appellant before the court are as follows:

(a) there was no factual or legal justification for the suspension order made by the DB; and C

(b) there was no legal justification for the restitution order.

At the hearing of the appeal, counsel for the appellant submitted that the letter of formal complaint against his client is the letter from 1st respondent to the DB dated 30 August 2006 (hereinafter referred to as the first complaint). That first complaint is directed against the legal firm of Messrs Junaidah, Mogana and Partners. Counsel also submitted that the letter of complaint from 1st respondent to DB dated 2 February 2007 (hereinafter referred to as the second complaint) except for the second paragraph is exactly the same as that contained in the first complaint. Of special importance is the specific reference to the ref. no. DB/06/2640. Throughout his submission, counsel kept on referring to this ref. no. as being crucial because it showed that there is a connection via that reference to the complaint against his client ie, that of the first complaint and not the second complaint. He argued that the second complaint is premised on the first complaint. D E F

[4] Counsel for appellant also argued of the conflicting position taken by the DB *vide* letter to 1st respondent dated 7 December 2006 where it stated that the DB "cannot now add Ms Mogana Sundhari A/P Subramaniam into your said complaint. You may however, lodge a separate complaint against her in which we will assign a separate complaint number after you have complied with our guidelines to lodge a complaint." In contrast, the DB later, on 1 March 2007 sent a letter to the appellant containing the following words "As the crux of the complaint involved your firms cheque the board is of the view that you are also to be named as respondent in the complaint ..." G H I

[5] Submission on the propriety of the suspension order and restitution order, simply put, depends on whether the new provisions under the Legal Profession (Amendment) Act 2006 (Act A1269) applies to the appellant. In other words can the DB exercise the powers under the Act A1269 to the appellant. Counsel argued that it could not.

[6] Counsel for the 1st respondent submitted that it is the letter dated 2 February 2007 that forms the formal complaint (second complaint) and had complied with r. 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. When the second complaint was made, then only a new complaint reference is given ie, no: DC/07/2837 and because the second complaint was made after the coming into force of the Legal Profession (Amendment) Act 2006 on 2 October 2006, the DB was empowered to exercise the powers conferred on it under the law.

[7] Counsel for 2nd respondent submitted that the DB has taken the necessary step when it made its order on 25 April 2008 and that the order was made in accordance with the Legal Profession Act 1976.

[8] After hearing the submissions, the court is of the opinion that it need to determine the issue of when the complaint was made against the appellant. If the complaint was made prior to the coming into force of Act A1269, then the decision of the DB is ultra vires. If the complaint was made after the coming into force of Act A1269, then the decision of the DB is *intra vires*.

[9] To make a complaint, a person must comply with r. 3 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994. The director of the complaints secretariat shall not register complaints that had not complied with the rules. It is for this reason that the 'first complaint' was not registered against the appellant.

[10] On the point that there seem to be a conflict in DB's decision informing 1st respondent that it cannot proceed against appellant and subsequently it informed the appellant of its view to include the appellant as a respondent in the complaint, this court is of the opinion that the DB is entitled to do so ie, to include the appellant as a respondent in the complaint. Section 99(4)(b) of the Legal Profession Act 1976 provides the following:

(4) Where a complaint is made against a legal firm, it shall be deemed to be a complaint made:

(a) …

(b) in the case of a partnership, against all the advocates and solicitors who were at the material time, partners of the legal firm.

This court find that the letter dated 2 February 2007 (second complaint) had complied with r. 3(2) of PU(A) 189/1994 which provides:

(2) A complaint shall contain the following:

(a) the full name, identity card or passport number and address of the complainant;

(b) the facts of the complaint;

(c) copies of any documents that the complainant proposes to rely on in support of his complaint;

(d) the signature of the complainant; and

(e) the name and address of the complainant's solicitor, if any.

This court hold that the complaint against the appellant was made in the letter dated 2 February 2007.

[11] Following the finding that the letter of complaint was made on 2 February 2007, the DB after considering the disciplinary committee report, can exercise the powers under s. 103D and imposed a greater punishment than that recommended by the DC. This court finds that the DB's Order dated 25 April 2008 was made correctly and within the powers of the DB conferred by Act A1269.

[12] On reasons as stated aforesaid, this court rules that the appellant's appeal be dismissed with cost.